

# FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re	)	Case No.	03-07494-B7
	)	Adv. No.	03-90385-B7
MARIA ELENA DOUGLAS,	)		
	)		
Debtor.	)	ORDER	
	)		
WILLIAM M. BENJAMIN,	)		
	)		
Plaintiff,	)		
	)		
v.	)		
	)		
MARIA ELENA DOUGLAS,	)		
	)		
Defendant.	)		
	)		

Pursuant to a family court order, William Benjamin (Plaintiff) provided legal services on behalf of Debtor's minor daughter in connection with a review hearing regarding custody and visitation. The court apportioned Plaintiff's fees between Debtor and her ex-spouse. Debtor paid a small portion of the fees, but owed Plaintiff over \$5,000 as of the date of her petition. Plaintiff commenced this adversary proceeding seeking

1 a determination that the debt was nondischargeable under  
2 Bankruptcy Code § 523(a)(5), claiming it was in the nature of  
3 support for Debtor's child. The parties submitted a joint  
4 statement of issues and facts as well as written argument and  
5 asked this Court for a ruling without hearing. The Court ruled  
6 that the debt is in the nature of support and falls within the  
7 scope of § 523(a)(5). However, in her written argument, Debtor  
8 raised an alternative issue, which was not included in the joint  
9 statement of issues, which necessitated further participation by  
10 the parties. That issue is whether the "unusual  
11 circumstances exception," recognized and utilized by the  
12 Tenth Circuit in In re Lowther, 321 F.3d 946 (10th  
13 Cir.2002), should be applied in this case to render the debt  
14 dischargeable. The issue is really twofold - a legal issue  
15 of whether the "unusual circumstances exception" exists,  
16 and, if so, a factual issue of whether unusual circumstances  
17 exist in this case. The Court invited further briefing and  
18 took the matter under submission. For the reasons set forth  
19 below, the Court holds that the "unusual circumstances  
20 exception" created by the Tenth Circuit in Lowther is not an  
21 "exception" to § 523(a)(5). Accordingly, the Court holds  
22 the debt to be nondischargeable.

23 This Court has subject matter jurisdiction pursuant to  
24 28 U.S.C. § 1334 and General Order No. 312-D of the United  
25 States District Court for the Southern District of California.  
26 This is a core proceeding under 28 U.S.C. § 157(b)(2)(A)&(I).

1 **FACTS<sup>1</sup>**

2 On September 6, 2001, the Superior Court for the County of  
3 San Diego entered an order appointing Plaintiff as counsel for  
4 Debtor's minor child DiAnne Douglass (DiAnne) to represent her in  
5 preparation for a review hearing. At issue was Debtor's  
6 percentage of custody/visitation of DiAnne. Plaintiff was  
7 appointed to investigate and submit recommendations to the family  
8 court based upon the best interest of DiAnne. Plaintiff  
9 interviewed therapists, parents, teachers, relatives, doctors and  
10 other interested witnesses; attended several Independent  
11 Educational Plan meetings and school discipline meetings; met  
12 with both parents and DiAnne in their respective homes; spoke  
13 with DiAnne in person and on the phone; and drafted reports  
14 regarding the changing needs of the child.

15 The Superior Court's order provided that Plaintiff was to  
16 bill Debtor at the rate of \$50/hour and Debtor's ex-spouse  
17 \$100/hour. As of July 31, 2004, Debtor's share of Plaintiff's  
18 fees was \$5,264.80. In March 2004 Debtor began making monthly  
19 payments of \$50.00. She has paid \$200.00, leaving a balance  
20 owing to Plaintiff of \$5,064.80 ("Debt").

21 The issue initially submitted to the Court was whether the  
22 Debt is "in the nature of support and therefore nondischargeable  
23 under section 523(a)(5)."<sup>2</sup> In addition to the Joint Statement,  
24

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25 <sup>1</sup> The facts are taken from the "Amended Joint Statement of Issues of Fact and Law"  
26 submitted by Debtor and Plaintiff on August 19, 2004.

<sup>2</sup> See "Amended Joint Statement of Issues of Fact and Law" at 1:25-26.

1 the parties each submitted written argument. The Court reviewed  
2 both arguments and the authorities cited therein and, by Order  
3 entered March 30, 2005, ruled that under the circumstances of  
4 this case, the Debt is in the nature of support and would,  
5 barring application of an "unusual circumstances exception," be  
6 nondischargeable under § 523(a)(5). The Court has received  
7 additional briefing from the parties, and has taken the matter  
8 under submission to determine whether there is an "unusual  
9 circumstances exception" and, if so, whether the facts of this  
10 case warrant a finding of unusual circumstances.

#### 11 DISCUSSION

##### 12 Is there an "unusual circumstances exception"?

13 In her written argument, Debtor raised the "unusual  
14 circumstances" exception, arguing that a debt incurred in the  
15 nature of support shall nevertheless be discharged when "unusual  
16 circumstances exist." The "unusual circumstance" in this case  
17 is, according to Debtor, that she needs all of her income to  
18 support the child who lives with Debtor. According to Debtor's  
19 schedules her monthly income is exceeded by expenses resulting in  
20 a shortfall of \$163.46.

21 Debtor bases her argument on In re Lowther, 321 F.3d 946  
22 (10<sup>th</sup> Cir. 2002), in which the Tenth Circuit recognized, or  
23 created, the "unusual circumstances" exception:

24 Nevertheless, since this rule is fashioned around the  
25 best interests of the child, it also follows that the  
26 type of unusual circumstances most likely to warrant  
exception are those where discharge is in the best  
interests of the child. To hold that the general rule

1 of nondischargeability should prevail despite adverse  
2 effects upon the child would be to ignore the policy  
considerations behind § 523(a)(5).

3 Id. at 948-49. The court held the support obligation in that  
4 case to be dischargeable:

5 In light of Appellee's financial condition, and  
6 considering the needs and constraints of the custody  
7 relationship, it is clear that the obligation to pay  
8 the attorney's fees will adversely affect her ability  
to financially support the child in this case. These  
facts constitute unusual circumstances warranting this  
narrow exception to nondischargeability.

9 Id.

10 This Court is not persuaded that such an exception, which is  
11 not found in the Code section, was intended by Congress to exist.

12 Bankruptcy Code § 523(a)(5) excepts from discharge debts:

13 to a spouse, former spouse, or child of the debtor, for  
14 alimony to, maintenance for, or support of such spouse  
15 or child, in connection with a separation agreement,  
16 divorce decree or other order of a court of record,  
determination made in accordance with State or  
territorial law by a governmental unit, or property  
settlement agreement ....

17 11 U.S.C. § 523(a)(5). "When determining whether a particular  
18 debt is within the § 523(a)(5) exception to discharge, a court  
19 considers whether the debt is 'actually in the nature of ...

20 support.'" In re Chang, 163 F.3d 1138, 1140 (9<sup>th</sup> Cir. 1998)

21 (citing Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir.1984)).

22 This question is a factual determination made by the bankruptcy

23 court as a matter of federal bankruptcy law. Id. Under the

24 language of the statute and the direction of the Ninth Circuit,

25 the only determination to be made is whether the debt is in the

26 ///

1 nature of support. Once this determination is made, the matter  
2 would appear to be resolved.

3 As discussed above, however, the Tenth Circuit in Lowther  
4 determined, based upon a review of its prior Tenth Circuit  
5 authority, In re Jones, 9 F.3d 878, 881-82 (10<sup>th</sup> Cir. 1993), that  
6 a further consideration had to be determined. Once there was a  
7 finding that the debt was in the nature of support, the Court had  
8 to further consider whether "unusual circumstances" existed to  
9 permit the discharge of the otherwise nondischargeable debt.

10 In Lowther, the Tenth Circuit explained the origin of the  
11 "unusual circumstances exception" in this way:

12 Title 11 U.S.C. § 523(a)(5) lists certain exceptions  
13 for discharge, including any debt "to a spouse, former  
14 spouse, or child of the debtor, for alimony to,  
15 maintenance for, or support of such spouse or  
16 child...." In Jones, we addressed the question of  
17 whether a court-ordered obligation to pay attorney's  
18 fees incurred in connection with a custody dispute was  
19 nondischargeable pursuant to § 523(a)(5). See Jones, 9  
20 F.3d at 880. While holding that the obligations present  
in Jones should be included within the necessarily  
broad definition of "support," we specifically provided  
for the possibility of cases involving unusual  
circumstances warranting dischargeability. See *id.* at  
881-82. Because this court has never applied the  
unusual-circumstances exception, this is a matter of  
first impression.

21 321 F.3d 946, 948 (10<sup>th</sup> Cir. 2002). This Court has reviewed the  
22 Jones decision and concludes that the court in Lowther recognized  
23 an exception which the court in Jones did not in fact create.

24 In In re Jones, the Tenth Circuit stated:

25 ... that the term "support" as used in § 523(a)(5) is  
26 entitled to a broad application. . . . Generally,  
custody actions are directed towards determining which

1 party can provide the best home for the child and are,  
2 therefore, held for the child's benefit and support.  
3 Therefore, in order that genuine support obligations  
4 are not improperly discharged, we hold that the term  
5 "support" encompasses the issue of custody *absent*  
6 *unusual circumstances not present here*. Consequently,  
7 court-ordered attorney's fees arising from post-divorce  
8 custody actions are deemed in the nature of support  
9 under § 523(a)(5) as being incurred on behalf of the  
10 child.

11 9 F.3d 878, 881-82 (10<sup>th</sup> Cir. 1993) (emphasis added). The court  
12 did mention "unusual circumstances." However, it appears to this  
13 Court that the Tenth Circuit was referring to unusual  
14 circumstances which would indicate that the particular debt was  
15 not in the nature of support. That is, the court was not  
16 creating an exception to the rule that debt in the nature of  
17 support would be dischargeable, but rather recognizing that under  
18 certain circumstances fees arising from a custody action might  
19 not be in the nature of support.

20 The court in Jones began with the standard statement  
21 regarding the proper analysis:

22 Whether a court-ordered obligation to pay attorney's  
23 fees incurred in connection with a custody dispute  
24 falls within the parameters of § 523(a)(5) is an issue  
25 of federal law. State law does provide guidance as to  
26 whether a debt is to be considered in the "nature of  
support." However, "a debt could be in the 'nature of  
support' under section 523(a)(5) even though it would  
not legally qualify as alimony or support under state  
law."

9 F.3d at 880 (citations omitted). The court also noted the  
congressional intent and current state of case law:

Congressional policy concerning § 523(a)(5) "has always  
been to ensure that genuine support obligations would  
not be discharged." The circuits have split on the

1 issue of whether a post-divorce child custody action is  
2 properly considered to be in the nature of support.

3 Id. at 880-81 (citations and quotations omitted). The court went  
4 on to analyze the circuit cases finding support, In re Dvorak,  
5 986 F.2d 940, 941 (5th Cir.1993) and In re Peters, 964 F.2d 166,  
6 167 (2d Cir.1992), and one finding to the contrary, Adams v.  
7 Zentz, 963 F.2d 197 (8<sup>th</sup> Cir. 1992). None of those cases  
8 mentioned unusual circumstances. The concept came up later in  
9 the opinion in the court's discussion of Adams v. Zentz.

10 In Adams v. Zentz, the Eighth Circuit held that in a  
11 custody/visitation matter, the court must look into the facts of  
12 the case to determine "the function the award was intended to  
13 serve." 963 F.2d 197, 200 (8<sup>th</sup> Cir. 1992). The court held the  
14 debt to be dischargeable because the custody action focused not  
15 on the child's welfare, but rather the parents. Id. at 201. In  
16 rejecting this position, the court in Jones stated:

17 We reject the Eighth Circuit's directive that the  
18 bankruptcy court must look at the purpose behind the  
19 custody action and examine whether that action was held  
20 in order to determine the best interests of the child.  
21 In our view, in all custody actions, the court's  
22 ultimate goal is the welfare of the child.

23 Further, to require the court to determine the purpose  
24 of the custody action could require extensive hearings  
25 and fact-findings into the parties' subjective  
26 motivations which is more appropriate to the state  
court than a bankruptcy court. Here, Mr. Jones argues  
that Mrs. Jones' motivation for attempting to obtain  
custody of the children was to avoid paying child  
support. The state court made no findings on this issue  
and it is clearly one inappropriate for determination  
by the bankruptcy court. We agree that the best

26 ///



1 interest of the child is an inseparable element of  
2 the child's "support"--put another way, 11 U.S.C.  
3 § 523(a)(5) should be read as using the term "support"  
4 in a realistic manner; the term should not be read so  
5 narrowly as to exclude everything bearing on the  
6 welfare of the child but the bare paying of bills on  
7 the child's behalf. Since determination of child  
8 custody is essential to the child's proper "support,"  
9 attorney fees incurred and awarded in child custody  
10 litigation should likewise be considered as obligations  
11 for "support," *at least in the absence of clear*  
12 *indication of special circumstances to the contrary.*

13 Holtz v. Poe (In re Poe), 118 B.R. 809, 812  
14 (Bankr.N.D.Okla. 1990).

15 9 F.3d at 881 (emphasis added). Thus, the first mention of  
16 "special circumstances" in the Jones opinion, is in the language  
17 quoted from the Poe case - "at least in the absence of clear  
18 indication of special circumstances to the contrary." It is  
19 clear from this quoted language that the "special circumstances"  
20 referred to are special circumstances which would indicate in a  
21 particular case that attorney fees incurred and awarded in child  
22 custody litigation should not be considered as obligations for  
23 "support." That is, the existence or nonexistence of special  
24 circumstances is a factor in determining whether the particular  
25 debt is in the nature of support. It is not an exception to be  
26 applied after a particular debt has been found to be in the  
27 nature of support. The language in Jones relied upon by the  
28 court in Lowther immediately follows the Poe quote:

29 Generally, custody actions are directed towards  
30 determining which party can provide the best home for  
31 the child and are, therefore, held for the child's  
32 benefit and support. Therefore, in order that genuine  
33 support obligations are not improperly discharged, we  
34 hold that the term "support" encompasses the issue of  
35 custody absent unusual circumstances not present here.

1 Consequently, court-ordered attorney's fees arising  
2 from post-divorce custody actions are deemed in the  
3 nature of support under § 523(a)(5) as being incurred  
4 on behalf of the child. This debt is nondischargeable.

5 In re Jones, 9 F.3d at 882. As in Poe, the relevance of special  
6 circumstances is to whether or not the debt is in the nature of  
7 support. Once the issue of whether the debt is in the nature of  
8 support is resolved, there is no further analysis to be done.

9 Thus, it appears to this Court that the Tenth Circuit in  
10 Jones did not create an exception to § 523(a)(5). That is,  
11 Lowther did not apply an exception created in Jones, but rather  
12 created an exception upon a misreading of Jones.

13 The "unusual circumstances exception" finds no support in  
14 the language of 11 U.S.C. § 523(a)(5), though Congress has  
15 clearly demonstrated its ability to create such an exception.<sup>3</sup>  
16 Further, this Court is not aware of another court recognizing or  
17 applying the "unusual circumstances exception." One court at  
18 least has called it into question. See In re Sonntag, 2004 WL  
19 764728 (N.D.Tex. 2004) ("The court is not persuaded that the  
20 Fifth Circuit, having spoken so plainly in Dvorak and Hudson,  
21 would follow the Tenth Circuit.") The Ninth Circuit, when  
22 holding that a debt owed directly to a guardian ad litem was  
23 nondischargeable under § 523(a)(5), made no mention of any  
24 "unusual circumstances exception" though it cited Jones. See In  
25 re Chang, 163 F.3d 1138 (9<sup>th</sup> Cir. 1998).

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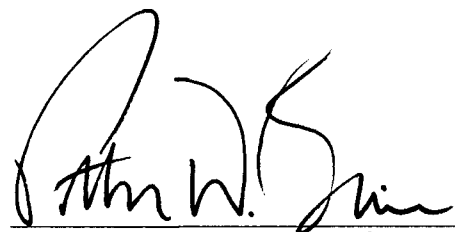
26 <sup>3</sup> See for example the "undue hardship" exception to the nondischargeability of student  
loans in § 523(a)(8) which is specifically spelled out in the statute.

1 The Court declines to adopt the "unusual circumstances  
2 exception" which the Court believes was created by the Tenth  
3 Circuit in Lowther based upon a misreading of Jones. The only  
4 issue properly before the court in determining whether a debt  
5 falls within the parameters of § 523(a)(5) is whether it is in  
6 the nature of support. Special circumstances may come into play  
7 in making that determination. However, once the determination is  
8 made that the debt is in the nature of support, no additional  
9 considerations are left to the bankruptcy court. Had Congress  
10 intended the courts to consider the influences a determination of  
11 nondischargeability might have on the debtor or the debtor's  
12 dependants, Congress could have written an exception into the  
13 statute, as it did in § 523(a)(8) and (a)(15). It did not, and  
14 this Court declines to do so in its stead.

15 **CONCLUSION**

16 For the reasons set forth above the Court holds that the  
17 debt owed to Plaintiff for services provided in the custody  
18 action in the amount of \$5,064.80 is in the nature of support  
19 within the meaning of 11 U.S.C. § 523(a)(5), and is therefore  
20 nondischargeable.

21 DATED: AUG 26 2005

22   
23 PETER W. BOWIE, Judge  
24 United States Bankruptcy Court  
25  
26

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re Case No. 03-07494-B7

Adversary No. 03-90385-B7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

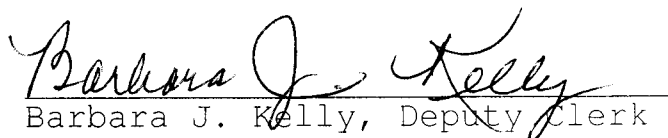
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Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on August 26, 2005.

  
Barbara J. Kelly, Deputy Clerk